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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 GLEN M. KINZEBACH,

8 Plaintiff,

9 -vs-

10 JO ANNE B. BARNHART,
Commissioner of Social Security,

11 Defendant.
12

NO. CV-04-0173-WFN

ORDER

13 PENDING BEFORE THE COURT are Cross Motions for Summary Judgment. (Ct.
14 Rec. 7, 12). Plaintiff is represented by Jeffrey Schwab; Defendant is represented by Assistant
15 United States Attorney Pamela J. DeRusha and Special Assistant United States Attorney
16 David J. Burdett.

17 **I. JURISDICTION**

18 On August 31, 2001, Plaintiff Glen Kinzebach protectively applied for Disability
19 Insurance and Supplemental Social Security Benefits. Plaintiff alleges disability due to
20 attention deficit disorder. He contends that this condition became disabling on September 30,
21 1998. Plaintiff's application was denied initially and on reconsideration. Plaintiff
22 appeared before Administrative Law Judge [ALJ] Mary B. Reed on June 4, 2003. The
23 ALJ issued a decision on November 25, 2003, finding that Plaintiff was not disabled and
24 denying his claim. The Appeals Council denied review, making the ALJ's decision the
25 final decision of the Commissioner. The instant matter is before the district court pursuant
26 to 42 U.S.C. § 405(g).

II. SEQUENTIAL EVALUATION PROCESS

The Social Security Act defines disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a claimant shall be determined to be under a disability only if his impairments are of such severity that the claimant is not only unable to do his previous work but cannot, considering claimant's age, education and work experiences, engage in any other substantial gainful work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920 *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987).

Step 1: Is the claimant engaged in substantial gainful activities? 20 C.F.R. §§ 404.1520a(a)(4)(i), 416.920a(a)(4)(i). If he is, benefits are denied. If he is not, the decision maker proceeds to step two.

Step 2: Does the claimant have a medically severe impairment or combination of impairments? 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii)). If the claimant does not have a severe impairment or combination of impairments, the disability claim is denied. If the impairment is severe, the evaluation proceeds to the third step.

Step 3: Does the claimant's impairment meet or equal one of the listed impairments acknowledged by the Commissioner to be so severe as to preclude substantial gainful activity? 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii); 20 C.F.R. § 404 Subpt. P, App. 1. If the impairment meets or equals one of the listed impairments, the claimant is conclusively presumed to be disabled. If the impairment is not one conclusively presumed to be disabling, the evaluation proceeds to the fourth step.

1 Step 4: Does the impairment prevent the claimant from performing work he has
 2 performed in the past? 20 C.F.R. §§404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, the
 3 claimant's residual functional capacity assessment is considered. If the claimant is able to
 4 perform his previous work, he is not disabled. If the claimant cannot perform his previous
 5 work, then the evaluation proceeds to the fifth and final step.

6 Step 5: Is the claimant able to perform other work in the national economy in view of
 7 his age, education, work experience and residual functional capacity? 20 C.F.R. §§
 8 404.1520(a)(4)(v), 416.920(a)(4)(v).

9 III. STANDARD OF REVIEW

10 "The [Commissioner's] determination that a claimant is not disabled will be
 11 upheld if the findings of fact are supported by substantial evidence." *Delgado v. Heckler*,
 12 722 F.2d 570, 572 (9th Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence is
 13 more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th
 14 Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-02
 15 (9th Cir. 1989). "It means such relevant evidence as a reasonable mind might accept
 16 as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401
 17 (1971) (citations omitted). "[S]uch inferences and conclusions as the [Commissioner]
 18 may reasonably draw from the evidence" will also be upheld. *Mark v. Celebrezze*, 348
 19 F.2d 289, 293 (9th Cir. 1965).

20 On review, the court considers the record as a whole, not just the evidence supporting
 21 the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989)
 22 (quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9th Cir. 1980)). The Commissioner's
 23 decision cannot be affirmed simply by isolating a specific quantum of supporting evidence,
 24 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999); however, if the evidence supports more
 25 than one rational interpretation, the court must uphold the decision of the ALJ. *Allen v.*
 26 *Heckler*, 749 F.2d 577, 579 (9th Cir. 1984). A decision supported by substantial evidence

1 will still be set aside if the proper legal standards were not applied in weighing the evidence
2 and making the decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d 432,
3 433 (9th Cir. 1987).

4 **IV. STATEMENT OF FACTS**

5 The facts have been presented in the administrative transcript and will only be
6 summarized here. At the time the ALJ issued her decision, Plaintiff was 34 years old. He has
7 fourteen years of education. His past relevant work includes employment as a kitchen helper,
8 dishwasher, commercial cleaner, dining room attendant, stock clerk, produce sorter,
9 horticultural worker, delivery person, and box maker. Plaintiff alleges that he has been
10 disabled since September 30, 1998, due to attention deficit disorder.

11 **V. COMMISSIONER'S FINDINGS**

12 At step one, the ALJ found Plaintiff had not engaged in substantial gainful activity
13 since the alleged onset of disability. At step two, the ALJ found that Plaintiff had an
14 impairment which was considered "severe" under the Social Security Regulations. At
15 step three, the ALJ found that Plaintiff's impairments did not meet or medically equal
16 any impairments described in the listing of impairments. The ALJ determined that
17 Plaintiff had the residual functional capacity to perform a full range of exertion; however,
18 his mental impairment (absent his marijuana use) caused moderate limitations in his
19 ability to interact appropriately with the public, accept instructions and respond
20 appropriately to supervisors, and get along with co-workers and peers. When substance
21 abuse was considered, the ALJ found that Plaintiff could not be able to perform his
22 past relevant work nor any other work that exists in the regional or national economy.

23 Notwithstanding the above findings, the ALJ concluded that Plaintiff was able to return
24 to his past relevant work when she excluded consideration of his substance abuse problems.
25 The ALJ therefore found that Plaintiff was not disabled within the meaning of the Social
26 Security Act. 20 C.F.R. §§404.1520(a)(4)(iv-v), 416.920(a)(4)(iv-v).

VI. ISSUES

Plaintiff contends that the Commissioner's findings are tainted by legal error and unsupported by substantial evidence. He argues the Commissioner's decision was in error because: (1) the ALJ did not provide adequate reasons for rejecting the opinions of Plaintiff's treating and examining physicians; (2) the ALJ's credibility determination was not supported by substantial evidence; and (3) the ALJ did not follow the correct legal standard in determining whether his substance abuse was a contributing factor material to his disability. This Court must uphold the Commissioner's determination that the claimant is not disabled if the Commissioner applied the proper legal standards and there is substantial evidence in the record as a whole to support the decision.

VII. DISCUSSION

The regulations distinguish among the opinions of three types of physicians: (1) sources who have treated the claimant; (2) sources who have examined the claimant; and (3) sources who have neither examined nor treated the claimant, but express their opinion based upon a review of the claimant's medical records. 20 C.F.R. § 416.927. A treating physician's opinion carries more weight than an examining physician's, and an examining physician's opinion carries more weight than a reviewing or consulting physician's opinion. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Plaintiff argues that the ALJ improperly rejected the opinions of Donald Rice, M.D., an examining psychiatrist; James Goodwin, Psy.D, a treating psychologist; Stephen Sutherland, Ph.D, an examining psychologist; Thomas Rowe, Ph.D, an examining psychologist; and Jeffrey Startzel, Psy.D, a treating psychologist.

In a disability proceeding, the treating physician's opinion is given special weight because he is employed to cure and has a greater opportunity to observe the claimant's physical condition. *Fair v. Bowen*, 885 F.2d 597, 604-05 (9th Cir. 1989); *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983). If the treating physician's opinions are not contradicted,

1 they can be rejected only with clear and convincing reasons. *Lester*, 81 F.3d at 830. If
2 contradicted, the ALJ may reject the opinion if she states specific, legitimate reasons that are
3 supported by substantial evidence. *Flaten v. Secretary of Health and Human Serv.*, 44 F.3d
4 1453, 1463 (9th Cir. 1995); *Fair*, 885 F.2d at 605. “As is the case with the opinion of a
5 treating physician, the Commissioner must provide ‘clear and convincing’ reasons for
6 rejecting the uncontradicted opinion of an examining physician.” *Lester*, at 830 (citation
7 omitted). If the opinion is contradicted, it can only be rejected for specific and legitimate
8 reasons that are supported by substantial evidence in the record. *Andrews v. Shalala*, 53 F.3d
9 1035, 1043 (9th Cir. 1995). Historically, the courts have recognized conflicting medical
10 evidence, the absence of regular medical treatment during the alleged period of disability, and
11 the lack of medical support for doctors’ reports based substantially on a claimant’s subjective
12 complaints of pain as specific, legitimate reasons for disregarding the treating physician’s
13 opinion. *Flaten*, 44 F.3d at 1463-64; *Fair*, 885 F.2d at 604. In evaluating whether the ALJ
14 provided adequate reasons for discrediting certain medical evidence, this Court is constrained
15 to the reasons provided by the ALJ. *See Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir.
16 2003).

17 Dr. James Goodwin, a treating psychologist, opined that Plaintiff’s impairments caused
18 moderate to severe cognitive and social limitations, including severe limitations in the ability
19 to perform routine tasks, relate appropriately to supervisors and co-workers, interact with the
20 public, and tolerate the pressure of a normal work setting. Dr. Goodwin stated that drug and
21 alcohol abuse moderately exacerbated Plaintiff’s mental impairment and recommended
22 discontinued cannabis consumption as part of his plan of care.

23 The ALJ rejected Dr. Goodwin’s impairment ratings because the assessed limitations
24 included the claimant’s substance abuse. This was not a specific and legitimate reason
25 for rejecting Dr. Goodwin’s findings regarding Plaintiff’s functional limitations. Pursuant
26 to *Bustamante v. Massanari*, 262 F.3d 949, 955 (9th Cir. 2001), the ALJ was required

1 to evaluate the medical opinions of record and determine which limitations were
2 impacted by alcoholism or drug addiction. It is noted that Dr. Goodwin stated that
3 the Plaintiff's drug and alcohol abuse caused only a *moderate* impact on his ability to
4 perform work related activities--this suggests that those limitations which were charac-
5 terized as "severe" would be reduced to "marked," leaving the Plaintiff with significant
6 limitations notwithstanding his substance abuse. It is also noted that Dr. Goodwin is
7 a treating physician offering an opinion in his area of specialty. "The agency generally
8 gives more weight to the opinion of a specialist about medical issues related to his or her
9 area of specialty than to the opinion of a source who is not a specialist." *Reed v. Massanari*,
10 270 F.3d 838, 845 (9th Cir. 2001) (citing 20 C.F.R. §§ 404.1527(d)(5), 416.927(d)(5)).
11 Dr. Goodwin's findings are therefore entitled to substantial deference on remand.

12 **VIII. CONCLUSION**

13 Because the Court finds that the ALJ improperly rejected the opinion of Dr.
14 Goodwin, it remands this matter for a reevaluation of the medical evidence. The
15 Commissioner is cautioned that the opinion of Dr. Mabee, standing alone, cannot form
16 the basis for discrediting Dr. Goodwin's findings regarding Plaintiff's functional limitations.
17 *See Morgan v. Commissioner of Social Sec. Admin.*, 169 F.3d 595, 602 (9th Cir. 1999). The
18 ALJ shall also reevaluate Plaintiff's credibility to the extent that it was discredited as being
19 unsupported by the medical evidence.

20 The Court does not conclude that the ALJ failed to follow the process set forth
21 in *Bustamante v. Massanari*. The ALJ did separate out the effects of the drug and
22 alcohol abuse; however, she did so on a provider by provider basis rather than in the
23 format recommended by the *Bustamante* decision. Notwithstanding, the ALJ is also
24 directed to reevaluate the Plaintiff's residual functional capacity and repeat steps four and five
25 of the sequential evaluation process in manner not inconsistent with this opinion.
26 Accordingly,

1. Plaintiff's Motion for Summary Judgment, **Ct. Rec. 7**, is **GRANTED**; the captioned matter is **REMANDED** for additional proceedings pursuant to sentence four of 42 U.S.C. § 405(g).

3. Judgment shall be entered for the **PLAINTIFF**. An application for attorney's fees may be filed by separate motion.

The District Court Executive is directed to file this Order, provide copies to counsel, and to **CLOSE THIS FILE**.

s/ Wm. Fremming Nielsen
WM. FREMMING NIELSEN
SENIOR UNITED STATES DISTRICT JUDGE